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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN BECERRA JARACUARO, Defendant and Appellant.	G045173 (Super. Ct. No. 10NF1961) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Scott A. Steiner, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Gary W. Brozio, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Adrian Becerra Jaracuaro was found not guilty of domestic battery with corporal injury as charged in count one of the information, but guilty of the lesser crime of domestic battery. The jury also found him guilty of spousal rape by force as charged in count two. He was found not guilty of making criminal threats as charged in count three, but guilty of the lesser crime of attempted criminal threats. The court sentenced defendant to six years in state prison.

The trial court did not err in instructing the jury about the crime of attempted criminal threat. Because there was no error, there was no ineffective assistance of counsel. We affirm.

I

FACTS

Brenda O. is married to defendant. On June 21, 2010, at 10:00 p.m., Brenda O. and her child were asleep and defendant entered the bedroom drunk. Defendant "wanted to have relations," but Brenda O. did not. Brenda O. cried as defendant pulled down her pants. She said she tried "not to let him lower them." She told him she did not want to have sex and tried, but was unable, to push him away from her. He forced himself on her and had sex. Defendant bit her on the neck and on her chest close to her breast. Brenda O. testified that after defendant ejaculated, he got off her.

Brenda O. went to the bathroom to bathe. She was in the shower crying when defendant pulled her out. Brenda O. testified "he told me that he was going to touch me again and have a relation with me."

A portion of her direct testimony reads:

Q: "Did he say anything to you about what . . . he would do if you didn't be quiet?"

A: "Yes. He was telling me to be quiet, and according to him, because he was really drunk, he was saying that he was going to kill me and was telling me many things."

Q: "When he said that to you, how did you feel?"

A: "With anger, with afraid."

Q: "You were afraid?"

A: "A little."

Q: "Why were you afraid?"

A: "Because I never thought he was going to do that, and that's why I became afraid of him. We would argue before, but — but he had never done anything. They were only words, but that day, I did — I was afraid of him."

A transcript of the 911 recording was read to the jury. A portion of it states:

Dispatcher: "Is he asleep?"

Brenda O.: "No. He's awake and he told me he was going to kill me."

Dispatcher: "Does he have any weapons?"

Brenda O.: "No. He's drinking. He has a lot of alcohol in his body."

[¶] . . .[¶]

Brenda O.: "It's that he raped me and then I want to go to take a shower but he didn't leave me and he told me that if I continue making noise he was going to kill me."

II

DISCUSSION

Defendant contends "the trial court committed reversible error in failing to sua sponte instruct that as to attempted criminal threat, reasonableness of the alleged victim's fear is an essential element of the offense." The Attorney General argues the trial court correctly instructed the jury on the lesser offense of attempted terrorist threats,

that defendant forfeited his instructional argument by failing to request a clarifying instruction, and that any ambiguity was cured by the prosecutor's argument.

We note defendant does not argue the court instructed the jury incorrectly. Rather he contends clarification was required. If the jury instructions are correct statements of the law and a defendant does not request clarification or amplification, the issue is forfeited on appeal. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.) Thus, we agree defendant forfeited his instructional argument, but address the merits nonetheless.

"Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (Pen. Code, § 422, subd. (a).) (All further statutory references are to the Penal Code.)

"Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished . . . ." (§ 664.) "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.)

The court instructed the jury with CALCRIM No. 1300 as follows: "The defendant is charged in Count 3 with having made a criminal threat in violation of Penal Code section 422. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully threatened to unlawfully kill or unlawfully

cause great bodily injury to Brenda [O.]; [¶] 2. The defendant made the threat orally; [¶] 3. The defendant intended that his statement be understood as a threat; [¶] 4. The threat was so clear, immediate, unconditional, and specific that it communicated to Brenda [O.] a serious intention and the immediate prospect that the threat would be carried out; [¶] 5. The threat actually caused Brenda [O.] to be in sustained fear for her own safety; [¶] AND [¶] 6. Brenda [O.]'s fear was reasonable under the circumstances. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. [¶] In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances. [¶] Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] Sustained fear means fear for a period of time that is more than momentary, fleeting, or transitory. [¶] An immediate ability to carry out the threat is not required."

The court also instructed the jury with CALCRIM No. 460 which states in relevant part: "To prove that the defendant is guilty of the lesser crime of Attempted Criminal Threats, the People must prove that: [¶] 1. The defendant took a direct but ineffective step toward committing a Criminal Threat; [¶] AND [¶] 2. The defendant intended to commit a Criminal Threat. [¶] A direct step requires more than merely planning or preparing to commit a Criminal Threat or obtaining or arranging for something needed to commit a Criminal Threat. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit a Criminal Threat. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt."

In *People v. Toledo* (2001) 26 Cal.4th 221, a jury convicted the defendant of attempted criminal threat as a lesser included offense of making a criminal threat. In that case, the husband said to his wife: "'You know, death is going to become you tonight. I am going to kill you.'" (*Id.* at p. 225.) The wife told her husband she did not care. In upholding the defendant's conviction of the crime of attempted criminal threat, the California Supreme Court analyzed the situation as follows: "A variety of potential circumstances fall within the reach of the offense of attempted criminal threat. For example, if a defendant takes all steps necessary to perpetrate the completed crime of criminal threat by means of a written threat, but the crime is not completed only because the written threat is intercepted before delivery to the threatened person, the defendant properly may be found guilty of attempted criminal threat. Similarly, if a defendant, with the requisite intent, orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not understand the threat, an attempted criminal threat also would occur. Further, if a defendant, again acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat. In each of these situations, only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself." (*Id.* at p. 231.)

A situation similar to the one in *Toledo* exists here. A reasonable jury could believe defendant expressed the requisite gravity of purpose and that Brenda O. reasonably could have been placed in fear by his threat to kill her, but that Brenda O. did not experience a sustained fear of being killed. That is, given Brenda O.'s testimony she was "a little" afraid, defendant's jury could have reasonably doubted she was in sustained fear.

Defendant cites *People v. Jackson* (2009) 178 Cal.App.4th 590 to support his argument. The defendant in *Jackson* said both that he would blow off and chop off some people's heads. (*Id.* at p. 594.) After making the threats, the defendant ranted and raved outside until the police arrived. A victim who testified said she "'feared for everybody's safety who was at the house. I didn't know what he was going to do.'" When asked if she believed the defendant was going to kill her, she said: "'I didn't think anything one way or the other, other than I didn't know what he was going to do next.'" (*Ibid.*) Another victim said he saw the defendant as a viable threat and kept his eye on him. (*Id.* at p. 595.) During argument, the prosecutor told the jury the only way it could find the defendant guilty of making an attempted criminal threat was "'if you found that they didn't actually — weren't actually afraid, he wanted them to be afraid, but they weren't afraid, you could find attempted . . . criminal threats. That's how that plays out.'" (*Id.* at p. 599.) The appellate court stated that "in deciding whether defendant had the intent necessary to support conviction for attempted criminal threat, the jury was not instructed to consider whether the intended threat reasonably could have caused sustained fear under the circumstances." (*Ibid.*) But the *Jackson* court specifically found "[c]ounsel's arguments did not fill the gap," and reversed defendant's conviction, stating: "In short, there was nothing in the instructions or the argument of counsel that told the jury that to be guilty of attempted criminal threat defendant's intended threat had to be one that reasonably could have caused the person to suffer sustained fear." (*Ibid.*)

Unlike the situation in *Jackson*, the prosecutor here did fill the gap left by the court's instructions. During final argument, the prosecutor stated: "An attempt. The attempt — the only attempt lesser in this case is the attempt 422, the attempt threat. And again, you don't get to the lesser unless you find the defendant not guilty of the greater part. [¶] But an attempt is an attempt to commit the offense. The person intends to commit the crime, takes a step towards committing the crime, but it's an ineffective step. [¶] So in this case, the way that you have — if possible, if you had an attempted criminal

threat would be is if you believe that the defendant made a threat to Brenda [O.], that he intended it to be a threat, that he could have — you know, he had the — it was immediate, unconditional, specific, but that she was not afraid. So that would be an attempt. [¶] If you think she was afraid, and it meets all the other elements, that would be the actual crime of the 422. So that's how you have an attempt in this case."

As we do not find error, defendant's ineffective assistance of counsel is without merit. Even if it had merit, however, we conclude there was no prejudice. (*Strickland v.Washington* (1984) 466 U.S. 668, 697.) "It is proper to review the instruction in combination with other instructions and/or the argument of counsel in determining if the instruction challenged on appeal confused the jury. [Citations.]" (*People v. Jaspar* (2002) 98 Cal.App.4th 99, 111.) Here, the prosecutor's argument supplied the clarification defendant claims the court's instructions lacked.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.